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ENTERTAINMENT COMPANY, LTD.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UM CORPORATION, a Japanese
corporation,

Plaintiff,

v.

TSUBURAYA PRODUCTIONS CO.,
LTD., a Japanese corporation,

Defendant.

Case No. 2:15-cv-03764-AB (AJWx)

**PLAINTIFF AND
COUNTERDEFENDANT UM
CORPORATION'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS
[Fed. R. Civ. P. 12(c)] OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT [Fed. R. Civ. P. 56]**

Date: September 12, 2016
Time: 10:00 a.m.
Location: Courtroom 4

AND RELATED CROSS-CLAIMS

Motion Hrng. Cutoff: January 9, 2017
Pretrial Conf.: March 27, 2017
Trial: April 18, 2017

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	3
A. Procedural Background and the Parties’ Allegations.....	3
B. Prior Lawsuits.....	5
1. The First Japanese Lawsuit.	5
2. The Thai Lawsuit.	6
3. The Second Japanese Lawsuit.....	6
4. The Chinese Lawsuit.....	8
C. Purported Termination of the 1976 Agreement.	9
LEGAL STANDARD.....	9
LEGAL ARGUMENT.....	11
I. UNDER THE LAST-IN-TIME RULE, THE 2013 CHINESE JUDGMENT AND/OR THE 2010 JAPANESE JUDGMENT PRECLUDE TPC’S CLAIM THAT THE 1976 AGREEMENT IS A FORGERY.....	11
A. Under the Doctrine of International Comity, the Chinese and Japanese Courts’ Judgments as to the Lack of Forgery are Entitled to Preclusive Effect.....	11
B. Under the Last-in-Time Rule, the 2013 Chinese Judgment and/or the 2010 Japanese Judgment as to the Lack of Forgery are Entitled to Preclusive Effect Vis-à-Vis the 2007 Thai Judgment.	15
C. Under the Doctrines of Claim and Issue Preclusion, the Chinese and Japanese Judgments Bar TPC from Relitigating Its Claims that the 1976 Agreement is a Forgery or Invalid.	19
D. The Thai Judgment is Not Entitled to Preclusive Effect.	22
II. TPC HAS NO RIGHT TO TERMINATE THE 1976 AGREEMENT.....	23
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

<i>Alfadda v. Fenn</i> , 966 F. Supp. 1317 (S.D.N.Y. 1997)	19
<i>Americana Fabrics, Inc. v. L & L Textiles, Inc.</i> , 754 F.2d 1524 (9 th Cir. 1985)	15, 16, 17, 18
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	11
<i>Applied Medical Resources Corp. v. U.S. Surgical Corp.</i> , 352 F. Supp. 2d 1119 (C.D. Cal. 2005)	22
<i>Branch v. Tunnell</i> , 14 F.3d 449 (9 th Cir. 1994)	10
<i>British Midland Airways Ltd. v. Int'l Travel, Inc.</i> , 497 F.2d 869 (9 th Cir. 1974)	13
<i>Chavez v. United States</i> , 683 F.3d 1102 (9 th Cir. 2012)	9
<i>Clark v. Yosemite Community College Dist.</i> , 785 F.2d 781 (9 th Cir. 1986)	11
<i>Cunard S.S. Co. v. Salen Reefer Serv. AB</i> , 773 F.2d 452 (2d Cir. 1985)	12
<i>Dworkin v. Hustler Magazine Inc.</i> , 867 F.2d 1188 (9 th Cir. 1989)	9
<i>Fairchild, Arabatzis & Smith, Inc. v. Prometco Co.</i> , 470 F. Supp. 610 (S.D.N.Y. 1979)	14
<i>Galbraith v. County of Santa Clara</i> , 307 F.3d 1119 (9 th Cir. 2002)	10
<i>Heliotrope Gen., Inc. v. Ford Motor Co.</i> , 189 F.3d 971 (9 th Cir. 1999)	10
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895)	12, 13
<i>Ibanez v. U.S. Bank Nat'l Ass'n</i> , 856 F. Supp. 2d 273 (D. Mass. 2012)	9
<i>In re Reynoso</i> , 477 F.3d 1117 (9 th Cir. 2007)	20, 21

TABLE OF AUTHORITIES
(cont'd)

	<u>Page</u>
<i>In re Simon</i> , 153 F.3d 991 (9 th Cir. 1998).....	12
<i>In-Tech Mktg. Inc. v. Hasbro, Inc.</i> , 719 F. Supp. 312 (D.N.J. 1989)	14
<i>International Nutrition Co. v. Horphag Research Ltd.</i> , 257 F.3d 1324 (Fed. Cir. 2001)	12
<i>Kamilche Co. v. United States</i> , 53 F.3d 1059 (9 th Cir. 1995), amended, 75 F.3d 1391 (9 th Cir. 1996).....	22
<i>Koehler v. Bank of Bermuda Ltd.</i> , 2004 WL 444101 (S.D.N.Y. Mar. 10, 2014)	17
<i>Loucks ex rel. Loucks v. Standard Oil Co. of N.Y.</i> , 224 N.Y. 99, 120 N.E. 198 (1918)	13, 14
<i>Lucido v. Superior Court</i> , 51 Cal. 3d 335 (1990)	21
<i>Montana v. United States</i> , 440 U.S. 147 (1979).....	20
<i>Mujica v. AirScan Inc.</i> , 771 F.3d 580 (9 th Cir. 2014).....	12, 15
<i>Neilson v. Union Bank of Cal.</i> , 290 F. Supp. 2d 1101 (C.D. Cal. 2003)	10
<i>No. 84 Employer – Teamster Joint Council Pension Trust Fund v. America West Holding Corp.</i> , 320 F.3d 920 (9 th Cir. 2003).....	10
<i>Ohno v. Yasuma</i> , 723 F.3d 984 (9 th Cir. 2013).....	13, 14
<i>Owens v. Kaiser Foundation Health Plan, Inc.</i> , 244 F.3d 708 (9 th Cir. 2001).....	10, 11
<i>Panama Processes, S.A. v. Cities Serv. Co.</i> , 796 P.2d 276 (Okla. 1990)	13
<i>Pony Express Records v. Springsteen</i> , 163 F. Supp. 2d 465 (D.N.J. 2001).....	11, 14
<i>Pravin Banker Assocs., Ltd. v. Banco Popular del Peru</i> , 109 F.3d 850 (2d Cir. 1997).....	12

TABLE OF AUTHORITIES
(cont'd)

	<u>Page</u>
<i>Reyn's Pasta Bella, LLC v. Visa USA, Inc.</i> , 442 F.3d 741 (9th Cir. 2006).....	11, 20, 21
<i>Robi v. Five Platters, Inc.</i> , 838 F.2d 318 (9 th Cir. 1988).....	15, 16, 17, 18
<i>Somportex Ltd. v. Phila. Chewing Gum Corp.</i> , 453 F.2d 435 (3d Cir. 1971).....	12, 14
<i>Sprewell v. Golden State Warriors</i> , 266 F.3d 979, amended on other grounds, 275 F.3d 1187 (9 th Cir. 2001)	9
<i>St. Louis Baptist Temple, Inc. v. FDIC</i> , 605 F.2d 1169 (10 th Cir. 1979).....	10
<i>Taylor v. Sturgell</i> , 553 U.S. 880 (2008).....	20
<i>Treinies v. Sunshine Mining Co.</i> , 308 U.S. 66 (1939).....	15
<i>U.S. ex rel. Cafasso v. General Dynamics C4 Sys., Inc.</i> , 637 F.3d 1047 (9 th Cir. 2011).....	9
<i>United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.</i> , 971 F.2d 244 (9 th Cir. 1992).....	10, 11
<i>Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.</i> , 121 F.3d 1332 (9 th Cir. 1997).....	15
<i>White v. City of Pasadena</i> , 671 F.3d 918 (9 th Cir. 2012).....	20, 21
<i>Wilson v. Marchington</i> , 127 F.3d 805 (9 th Cir. 1997).....	12, 13, 14
<i>Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme</i> , 433 F.3d 1199 (9 th Cir. 2006) (en banc)	14
<i>Yamaha Corp. of Am. v. United States</i> , 961 F.2d 245, 254 (D.C. Cir. 1992).....	22

TABLE OF AUTHORITIES
(cont'd)

Page

STATUTES

Civil Code of Japan	
Article 85	24
Article 540, Section 1	25
Article 593	24
Article 597	24
Article 597, Section 3	9, 23
Article 601	24
Article 617	24
Article 617, Section 1	9, 23, 24
Civil Procedure Law of China	
Article 281	9, 17
Article 282	9, 17

RULES

Federal Rules of Civil Procedure	
Rule 12	2, 9, 10
Rule 12(b)(6)	9
Rule 12(c)	9, 10
Rule 56(a)	11

MISCELLANEOUS

18 C. Wright, A. Miller & E. Cooper, <i>Federal Practice & Procedure</i> , § 4404 (1981)	17
18 C. Wright, A. Miller & E. Cooper, <i>Federal Practice & Procedure</i> , § 4404 (2002 & supp. 2015)	15, 18
2 W. Schwarzer, A. Tashima & J. Wagstaffe, <i>California Practice Guide: Federal Civil Procedure Before Trial</i> , § 9:321.1 (2016)	9
Restatement (Second) of Judgments (1982)	
Section 15	15
Section 15 cmt. c	16, 17
Section 15, cmt. n	16
Section 27, cmt. c	22
Restatement (Third) of Foreign Relations Law (1987)	
Section 482, cmt. e	23

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This lawsuit arises out of the conflicting claims of plaintiff and
4 counterdefendant UM Corporation (“UMC”) and defendant and counterclaimant
5 Tsuburaya Productions Co., Ltd. (“TPC”) to ownership of intellectual property
6 rights in several Japanese motion pictures based on the superhero Ultraman. UMC
7 contends that under a 1976 agreement (the “1976 Agreement”) between TPC and
8 UMC’s predecessor Sompote Saengduenchai (“Mr. Sompote”), UMC has an
9 exclusive, perpetual license to all copyrights and trademarks in various Ultraman
10 works in all countries outside of Japan. TPC alleges that the 1976 Agreement was
11 forged and is therefore invalid, and that it has terminated that Agreement. The
12 validity of the 1976 Agreement is the principal issue presented in this lawsuit; the
13 Court’s resolution of that issue may eliminate the need for much of the discovery
14 anticipated in this case, including the review and production of thousands of
15 foreign-language documents and numerous overseas depositions.

16 Over the past 15 years, TPC and Mr. Sompote and/or UMC have litigated
17 TPC’s claim that the 1976 Agreement is a forgery to final judgment through appeal
18 in four lawsuits in three different countries. In three of those lawsuits – including
19 the first decision and the two most recent decisions – the highest court to consider
20 the issue held that the 1976 Agreement was not forged and is valid. Specifically,
21 in a December 10, 2003 Judgment by the Tokyo Appellate Court, a September 30,
22 2010 Judgment by the Tokyo District Court, and a September 29, 2013 Civil
23 Ruling by the Supreme People’s Court of the People’s Republic of China, courts in
24 Japan and China rejected TPC’s argument that the 1976 Agreement was forged. In
25 a November 14, 2007 Judgment, the Thai Supreme Court accepted TPC’s
26 argument that the 1976 Agreement was forged.

27 This is now the *fifth* lawsuit in which TPC has sought to litigate the same
28 forgery issue, relying on the same arguments and facts that it presented to the prior

1 tribunals. Enough is enough. By this motion, UMC asks the Court to apply *res*
2 *judicata* and/or issue preclusion to preclude TPC from yet again raising a claim
3 that has been squarely rejected by the highest courts to have heard that claim in
4 both Japan and, most recently, China.

5 Under the doctrine of international comity, courts in the United States may
6 afford preclusive effect to the judgments of foreign courts. Under the last-in-time
7 doctrine, if two or more courts have rendered inconsistent judgments on the same
8 claim or issue, preclusive effect should generally be given to the last-in-time
9 judgment. Here, TPC's claim of forgery was rejected by the two most recent
10 Judgments to have addressed that claim, those issued by the Chinese Supreme
11 People's Court on September 29, 2013 and the Tokyo District Court on September
12 30, 2010. Accordingly, the Court should apply preclusive effect to the Chinese
13 and/or Japanese Judgments, and grant judgment on the pleadings or summary
14 judgment against TPC's affirmative defenses and counterclaims to the extent they
15 require proof that the 1976 Agreement was forged or is unenforceable (including
16 TPC's affirmative claims for relief based upon UMC's alleged infringement of
17 intellectual property rights transferred by TPC under that Agreement).

18 In July 10, 2014 letters, TPC purported to terminate the 1976 Agreement,
19 relying upon provisions of the Civil Code of Japan that apply to demands for the
20 return of "borrowed Things" and the termination of leases of land, buildings, and
21 tangible property. Because those statutes do not authorize termination of an
22 intellectual property license, the Court should grant summary judgment against
23 TPC's defenses and claims that are based upon the alleged termination.¹

24
25 ¹ UMC has challenged TPC's claim that the 1976 Agreement has been terminated
26 through a motion for summary judgment rather than a Rule 12 motion because
27 TPC's Counterclaims do not allege the basis for TPC's position that the 1976
28 Agreement has been terminated, making it necessary to consider evidence extrinsic
to the Counterclaims to determine the basis for the alleged termination. In
challenging the claimed termination of the 1976 Agreement, UMC's motion relies
upon a purely legal issue, the interpretation of the Japanese statutes relied upon by
TPC.

BACKGROUND

A. Procedural Background and the Parties' Allegations.

On May 19, 2015, UMC filed its Complaint [Dkt. 1], naming TPC as the sole defendant and alleging claims for copyright infringement, breach of contract, intentional interference with contractual relations, and declaratory relief. Dkt. 1 at 11-15, ¶¶ 33-56. UMC's claims are predicated upon a March 4, 1976 Agreement (the "1976 Agreement") (subsequently assigned to UMC) in which TPC granted Mr. Sompote rights to Ultraman outside of Japan. *Id.* at 4-5, ¶¶ 9-13.

On September 11, 2015, TPC filed its Answer, Affirmative Defenses and Counterclaims [Dkt. 19], naming UMC, Ultraman USA, Inc. ("Ultraman USA"), Mr. Sompote, Golden Media Group, Inc. ("GMG"), and TIGA Entertainment Company, Ltd. ("TIGA") as counterdefendants and alleging a First Counterclaim for Relief for copyright infringement and a Second Counterclaim for Relief for declaratory relief. Dkt. 19 at 24-26, ¶¶ 46-54.

In its Answer, TPC asserted three affirmative defenses that are directed towards the validity of the 1976 Agreement: (1) the Third Affirmative Defense, which alleges that "[UMC's] claims are barred, in whole or in part, by the fact that [UMC's] claims are based on fraudulent documents and/or documents that were procured by fraud"; (2) the Tenth Affirmative Defense, which alleges that "[UMC's] claims are barred in whole or in part by the doctrines of *res judicata* and collateral estoppel"; and (3) the Eleventh Affirmative Defense, which alleges that "[UMC's] claims are barred because the contract pursuant to which [UMC] asserts rights and seeks relief has been terminated and/or is otherwise invalid under Japanese law." *Id.* at 10.

TPC's Counterclaims are both predicated upon the contention that the 1976 Agreement is invalid or unenforceable and that TPC therefore owns rights to the works at issue. The First Counterclaim for Copyright Infringement raises the claimed invalidity of the 1976 Agreement by alleging that "Counterdefendants

1 have infringed and are continuing to infringe the Copyrighted Works, including by
2 copying, distributing, publicly displaying and publicly performing the Ultraman
3 Library *without [TPC's] authorization.*² *Id.* at 24, ¶ 48 (emphasis added).

4 The Second Counterclaim for Declaratory Relief squarely presents the issue
5 of the validity and enforceability of the 1976 Agreement: “[TPC] believes that it is
6 and remains the exclusive owner of any and all rights in the Copyrighted Works
7 and that Counterdefendants have no right to distribute, reproduce, display or create
8 derivative works from these works. [TPC] is informed and believes, and thereupon
9 alleges, that Counterdefendants dispute all of this, and *do so based on the 1976*
10 *Document.*” *Id.* at 25, ¶ 53 (emphasis added). Similarly, the declaratory relief
11 sought by TPC is directed towards the validity of the 1976 Agreement; TPC “seeks
12 a declaratory judgment that (1) [TPC] is the exclusive owner of any and all rights
13 in the Copyrighted Works, and Counterdefendants have no rights to distribute,
14 reproduce, display or create derivative works from these works; (2) *the 1976*
15 *Document is of no force or effect*; and (3) [TPC] has no obligations to
16 Counterdefendants.” *Id.* at 25-26, ¶ 54 (emphasis added).

17 In support of these counterclaims, TPC alleges on information and belief
18 that “Sompote and/or those affiliated with him falsified a document claiming to
19 have been dated in or about 1976 purporting to grant Sompote certain copyright
20 and/or trademark rights in certain works contained in the Ultraman Library as an
21 exclusive licensee in all territories except Japan (the ‘1976 Document’).” *Id.* at 20,

22
23 ² The Counterclaims identify the copyrights as being for Ultraman—The
24 Adventure Begins, Ultraman—Towards the Future, “and all episodes in the series
25 of Ultra Q, Ultraman, Ultra Seven, The Return of Ultraman, Ultraman Ace,
26 Ultraman Taro, and Jumborg Ace (applications for registration of which were filed
27 in the United States Copyright Office on September 9 and 10, 2015, and remain
28 pending).” Dkt. 19 at 19-20, ¶ 29. The titles of the latter seven series match, with
minor variations, the titles of the television shows identified in the 1976
Agreement: (1) ULTRAMAN 1 “ULTRA Q” (28 x 20 Min); (2) ULTRAMAN 2
(39 x 30 Min); (3) ULTRAMAN SEVEN (50 x 30 Min); (4) RETURN
ULTRAMAN (51 x 30 Min); (5) ULTRAMAN ACE (51 x 30 Min); (6)
ULTRAMAN TARO (54 x 30 Min); and (7) JAMBORG ACE (50 x 30 Min). *See*
1976 Agreement (Ex. A to Declaration of Jeffrey D. Wexler).

¶ 32. TPC further alleges that UMC is relying upon the 1976 Agreement as a justification for its use of the Ultraman works at issue and its contention that TPC is infringing UMC's rights in those works. *See id.* at 12, 20-21, ¶¶ 3, 33.

TPC alleges that the Thai Supreme Court rejected Mr. Sompote's claims based upon the 1976 Agreement and implies that other courts have also rejected such claims.³ *See id.* at 12, 20-21, ¶¶ 3, 33-35. As discussed in detail below, however, in the three other cases where TPC raised its forgery claim, such claim was rejected by the highest courts to have considered the issue – the Tokyo Appellate Court (in 2003), the Tokyo District Court (in 2010, in a separate lawsuit), and the Chinese Supreme People's Court (in 2013).

On October 16, 2015, UMC filed its Answer and Affirmative Defenses [Dkt. 31]. As a Ninth Affirmative Defense, UMC alleges that "Defendants' counterclaims are barred in whole or in part by the doctrines of collateral estoppel, adjudicatory comity, and/or *res judicata*."⁴ Dkt. 31 at 10.

B. Prior Lawsuits.

1. The First Japanese Lawsuit.

In 1997, TPC filed a lawsuit against Mr. Sompote in the Tokyo District Court. *See* Request for Judicial Notice ("RJN"), Ex. B, at 4-5 (September 30, 2010 Tokyo District Court Judgment describing prior lawsuit). In a February 28, 2003

³ *See* Dkt. 19 at 21, ¶ 33 ("Sompote and his affiliated entities have already tried—***and failed***—to use the 1976 Document to erase [TPC's] claims to the copyrights in the Ultraman Library ***in other countries***") (emphasis added); *id.* at 21, ¶ 35 ("[d]espite these setbacks, and ***despite losing his claims in foreign venues***, [TPC] is informed and believes, and thereupon alleges, that Sompote's baseless efforts to profit from [TPC's] creativity and erase [TPC's] copyrights have now reached American shores") (emphasis added).

⁴ In their Answers filed on November 4, 2015, November 19, 2015, and February 22, 2015, respectively, Ultraman USA, GMG, and TIGA asserted similar affirmative defenses. *See* Dkt. 35 at 3 (Ultraman USA's Eighth Affirmative Defense); Dkt. 43 at 11 (GMG's Ninth Affirmative Defense); Dkt. 59 at 9 (TIGA's Eighth Affirmative Defense). TPC claims to have served the remaining counterdefendant, Mr. Sompote, on June 27, 2016, *see* Dkt. 68; Mr. Sompote has not yet appeared in this lawsuit, and TPC on July 21, 2016 requested the clerk to enter his default, *see* Dkt. 71.

Judgment, the Tokyo District Court held that the 1976 Agreement was genuine.
See id. at 5. On December 10, 2003, the Tokyo Appellate Court agreed with the
Tokyo District Court as to the authenticity of the 1976 Agreement. *See id.* at 5-6
On April 27, 2004, the Supreme Court of Japan declined to hear TPC's appeal.
See id. at 6.

2. The Thai Lawsuit.

In 1997, TPC sued Tsuburaya Chaiyo Company Limited ("Chaiyo"), Mr.
Sompote, Perasit Saengduenchai ("Mr. Perasit"), and Book Athens Distribution
Company Limited in Thailand. *See* Declaration of Jeffrey D. Wexler ("Wexler
Decl."), Ex. B, at 1, 3 (unofficial translation of November 14, 2007 Thai Supreme
Court Judgment).⁵ In an April 4, 2000 decision, the Thai Central Intellectual
Property and International Trade Court dismissed TPC's claim that the 1976
Agreement was forged. *See id.* at 2, 13-16. On November 14, 2007, the Thai
Supreme Court reversed, accepting TPC's claim that the 1976 Agreement was
forged.⁶ *See id.* at 31-40.

3. The Second Japanese Lawsuit.

In 2009, Mr. Sompote filed a lawsuit against TPC in Tokyo District Court;
UMC intervened in that lawsuit. *See* RJN, Ex. B, at 1. On September 30, 2010,
the Tokyo District Court issued a Judgment in which it held that TPC could not
raise the forgery issue again because that issue had been resolved against TPC by
the Tokyo Appellate Court in 2003. *See id.*, Ex. B.

The Tokyo District Court recognized that there had already been Judgments
by courts in three different countries with regard to, *inter alia*, the claim that the

⁵ UMC has not sought judicial notice of the Thai Supreme Court's Judgment and
does not vouch for the unofficial translation of that Judgment. UMC is providing
that Judgment to the Court as background for the issues presented by this motion.

⁶ The Thai Supreme Court's Judgment did not refer to the 2003 Judgments of the
Tokyo District Court and the Tokyo Appellate Court, let alone address the issue
whether such Judgments should be given preclusive effect. *See* Wexler Decl., Ex.
B.

1 1976 Agreement was a forgery: (1) the 2003 Judgment by the Tokyo Appellate
2 Court holding that the 1976 Agreement was not a forgery; (2) the 2007 Judgment
3 by the Thai Supreme Court holding that the 1976 Agreement was a forgery; and
4 (3) the September 16, 2009 Judgment of the Guangzhou Intermediate People's
5 Court holding that the 1976 Agreement was a forgery.⁷ *See id.* at 4-7. The Tokyo
6 District Court summarized the parties' briefing of the issue as to the effect of the
7 prior Judgments, *see id.* at 13-16, 34-35, then held that the 2003 Tokyo litigation
8 barred TPC from relitigating the issue of the validity of the 1976 Agreement:

9 [Mr. Sompote], with [UMC], and [TPC] have been disputing over the
10 validity of the contract and its binding effect (the result of this
11 contract); [TPC's] claim was that the contract was a forged document,
12 and therefore the contract was not binding, and also that there was no
13 consensus from the company's board members in signing this
14 contract. However, by examinations of the evidences (A 4 and 6) and
15 arguments, the court has acknowledged that (1) [TPC] filed the
16 litigation against [Mr. Sompote] prior to this litigation in Tokyo, (2)
17 [TPC] made the same main claim in the Tokyo litigation that the
18 contract was a forged document and there was no consensus by the
19 board (also, the claim of the contract being void was added during the
20 appeal hearing), and (3) the Tokyo District Court and the High Court
21 have verified that [Mr. Sompote] possesses the exclusive exploitation
22 rights within the judgment text. In their explanations, the court has
23 stated that the contract was valid, according to evidences and
24 depositions (B 16), and has binding effect. Also regarding the effects
25 of this contract, the actual contract itself is binding in principle even if
the representative director disposed of significant assets without the
decision of the board; therefore the decision that this contract is valid
was made. (4) The Tokyo Supreme Court dismissed [TPC's] appeal
against the Tokyo High Court's decision; hence the judgment has
become final. [TPC] stated some facts, to disprove the validity of the
contract, which are the results from signature analysis which indicated
that the signature was not of Noboru, inconsistencies in the content of
the contract, the fact about the exclusive exploitation rights already
being given to the third party prior to the forming of the contract, and
the fact that [Mr. Sompote] has never openly claimed his rights for the
past 20 years. However, those exact statements were given by [TPC]
in the Tokyo litigation as well.

24 ***Considering all of the facts described above, [TPC's] claims in the***
25 ***dispute for the validity of the contract and its binding effect are***

26 ⁷ As discussed below, on October 25, 2010, one month after the Tokyo District
27 Court's Judgment, the Higher People's Court of Guangdong Province overruled
28 the September 16, 2009 Judgment of the Guangzhou Intermediate People's Court
and held that the 1976 Agreement was not a forgery. *See* RJN, Ex. H, at 16-19,
21-22.

1 *merely a repeat of the Tokyo litigation. According to the general*
2 *practices of litigations, it is not permitted to make same claims to*
turnover the previously litigation's judgment. [Citations omitted.]

3 Therefore, based on evidences and arguments (A 2, A 4, A 6 and B
4 16) made by the parties, *the court finds that the forming of the*
contract was legally binding.

5 *Id.* at 42-44 (emphasis added). The Tokyo District Court explained that it was
6 declining to follow the Thai Supreme Court's Judgment as contrary to the prior
7 Japanese Judgments. *See id.* at 53-54.

8 On July 27, 2011, the Japanese Intellectual Property High Court filed a
9 Judgment ruling on the appeals of TPC and UMC without addressing TPC's claim
10 that the 1976 Agreement was forged (suggesting that TPC did not raise that
11 argument on appeal). *See* RJN, Ex. D. On April 26, 2012, the Supreme Court of
12 Japan declined to hear TPC's appeal from the Japanese Intellectual Property High
13 Court's Judgment. *See* RJN, Ex. F.

14 **4. The Chinese Lawsuit.**

15 On September 30, 2005, Mr. Sompote and Chaiyo filed suit in the
16 Guangzhou Intermediate People's Court against TPC, Shanghai Tsuburaya Co.,
17 Ltd., Guangzhou Book Acquisition Center Co., Ltd., and Shanghai Audiovisual
18 Press. *See* RJN, Ex. H, at 5. In a September 16, 2009 Judgment, the Guangzhou
19 Intermediate People's Court held that the 1976 Agreement was invalid and that Mr.
20 Sompote and Chaiyo did not own rights to the copyrighted materials. *See id.* at 11-
21 13. In an October 25, 2010 Judgment, the Higher People's Court of Guangdong
22 Province reversed the lower court's ruling, holding that the 1976 Agreement was
23 indeed authentic. *See id.* at 16-19, 21-22.

24 On September 29, 2013, the Chinese Supreme People's Court upheld the
25 decision of the Higher People's Court of Guangdong Province. *See id.* at 22-26.
26 The Chinese Supreme People's Court affirmed the lower court's finding that TPC
27 had failed to provide evidence to prove the claim that the 1976 Agreement was
28 faked. *Id.* at 23-25. The Chinese Supreme People's Court rejected TPC's

1 argument that it should afford preclusive effect to the 2007 Judgment of the
2 Supreme Court of Thailand on the ground that TPC had failed to apply to the
3 Chinese Intermediate People's Court for recognition of that Judgment, as it was
4 required to do under Articles 281 and 282 of the Civil Procedure Law of China for
5 the Chinese courts to consider that Judgment. *See id.* at 7-9, 25.

6 **C. Purported Termination of the 1976 Agreement.**

7 On July 10, 2014, Shinichi Ooka of TPC sent a letter to Mr. Perastit stating
8 that TPC "hereby notif[ies] both you and UM[C] that [TPC] is effectively
9 terminating the 1976 Agreement by service of this letter under Article 597, Section
10 3 of the Civil Code of Japan (if there is any compensation for such rights, under
11 Article 617, Section 1 thereof) as the 1976 License Agreement has an indefinite
12 term." Wexler Decl., Ex. C. Mr. Ooka also sent a letter to Mr. Sompote
13 purporting to terminate the 1976 Agreement. *See id.*, Ex. D.

14 **LEGAL STANDARD**

15 **Judgment on the Pleadings.** "Rule 12(c) is 'functionally identical' to Rule
16 12(b)(6)." *U.S. ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047,
17 1054 n. 4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d
18 1188, 1192 (9th Cir. 1989)). Thus, "[a]nalysis under Rule 12(c) is 'substantially
19 identical' to analysis under Rule 12(b)(6)." *Chavez v. United States*, 683 F.3d
20 1102, 1108 (9th Cir. 2012). However, "[a] Rule 12(c) motion differs from a Rule
21 12(b)(6) motion in that it implicates the pleadings as a whole.'" 2 W. Schwarzer,
22 A. Tashima & J. Wagstaffe, *California Practice Guide: Federal Civil Procedure*
23 *Before Trial*, § 9:321.1, at 9-122 (2016) (quoting *Ibanez v. U.S. Bank Nat'l Ass'n*,
24 856 F. Supp. 2d 273, 275 (D. Mass. 2012)).

25 Documents attached to the complaint and incorporated by reference are
26 treated as part of the complaint for purposes of a Rule 12(b)(6) motion. *See*
27 *Spewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended on other grounds*,
28 275 F.3d 1187 (9th Cir. 2001). Similarly, in ruling on a Rule 12 motion to dismiss,

1 the Court may consider documents referenced in the complaint, even though they
2 are not attached thereto. *See, e.g., No. 84 Employer – Teamster Joint Council*
3 *Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 925 n. 2 (9th
4 Cir. 2003) (“[u]nder the incorporation by reference doctrine, we also consider
5 documents submitted by Defendants that were referenced in the complaint and
6 whose authenticity has not been questioned”); *Branch v. Tunnell*, 14 F.3d 449,
7 453-54 (9th Cir. 1994) (same), *overruled on other grounds, Galbraith v. County of*
8 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Here, the 1976 Agreement may
9 properly be considered on a Rule 12 motion because it is referenced repeatedly in
10 TPC’s Answer/Counterclaims, and there is no dispute that the 1976 Agreement is
11 an authentic copy of the document that TPC contends to be a forgery.⁸ *See* Dkt. 19
12 at 10 (Third & Eleventh Affirmative Defenses); *id.* at 12, 20-21, 25, ¶¶ 3, 32-35,
13 53; *id.* at 26, prayer, ¶ 3.

14 Furthermore, extrinsic evidence that is subject to judicial notice may be
15 properly considered on a Rule 12(c) motion. *See Heliotrope Gen., Inc. v. Ford*
16 *Motor Co.*, 189 F.3d 971, 981 n. 18 (9th Cir. 1999). “Court orders and filings are
17 the type of documents that are properly noticed under [Rule 201(b)].” *Neilson v.*
18 *Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1113 (C.D. Cal. 2003). Thus, courts
19 “‘may take notice of proceedings in other courts, both within and without the
20 federal judicial system, if those proceedings have a direct relation to matters at
21 issue.’” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*,
22 971 F.2d 244, 248 (9th Cir. 1992) (quoting *St. Louis Baptist Temple, Inc. v. FDIC*,
23 605 F.2d 1169, 1172 (10th Cir. 1979)).

24 A party may bring a Rule 12(c) motion for judgment on the pleadings based
25 upon *res judicata*. *See Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d

26
27 ⁸ Because TPC alleges that the 1976 Agreement is forged, UMC’s request that the
28 Court consider that Agreement is contingent on the Court first finding that the
2013 Chinese Judgment and/or the 2010 Japanese Judgment bar TPC from
relitigating the validity of that Agreement.

708, 713-15 (9th Cir. 2001); *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 784 (9th Cir. 1986). When determining whether the results of prior litigation preclude a claim, the Court may take judicial notice of materials from the prior litigation. *See, e.g., Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 & n. 6 (9th Cir. 2006) (taking judicial notice of briefs and hearing transcript to identify the issues that had been litigated and settled in prior litigation, for purposes of issue preclusion); *United States ex rel. Robinson Rancheria Citizens Council*, 971 F.2d at 248 (taking judicial notice of state court judgment in affirming dismissal of complaint based on *res judicata*).

Summary Judgment. Summary judgment is required “if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The non-movant must identify specific facts that show a genuine issue of material fact for trial, *i.e.*, that the facts could allow a reasonable jury to return a verdict for the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

LEGAL ARGUMENT

I. UNDER THE LAST-IN-TIME RULE, THE 2013 CHINESE JUDGMENT AND/OR THE 2010 JAPANESE JUDGMENT PRECLUDE TPC'S CLAIM THAT THE 1976 AGREEMENT IS A FORGERY.

A. Under the Doctrine of International Comity, the Chinese and Japanese Courts' Judgments as to the Lack of Forgery are Entitled to Preclusive Effect.

Although the Full Faith and Credit Clause of the United States Constitution does not apply to judgments of foreign courts, courts in the United States afford preclusive effect to the judgments of foreign courts by relying upon the doctrine of international comity. *See, e.g., Pony Express Records v. Springsteen*, 163 F. Supp. 2d 465, 471-72 (D.N.J. 2001).

International comity ““is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due

1 regard both to international duty and convenience, and to the rights of its own
2 citizens or of other persons who are under the protection of its laws.””” *Mujica v.*
3 *AirScan Inc.*, 771 F.3d 580, 597-98 (9th Cir. 2014) (quoting *In re Simon*, 153 F.3d
4 991, 998 (9th Cir. 1998) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895))).
5 “Comity is a ‘rule of “practice, convenience, and expediency” rather than of law’
6 that courts have embraced ‘to promote cooperation and reciprocity with foreign
7 lands.’” *Id.* at 598 (quoting *Pravin Banker Assocs., Ltd. v. Banco Popular del*
8 *Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (quoting *Somportex Ltd. v. Phila. Chewing*
9 *Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971))).

10 When applying comity to preclude a party from relitigating claims already
11 decided in another country, a court must determine that doing so would be fair.
12 “As a general rule, comity may be granted where ‘it is shown that the foreign court
13 is a court of competent jurisdiction, and that the laws and public policy of the
14 forum state and the rights of its residents will not be violated.’” *International*
15 *Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001)
16 (quoting *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir.
17 1985)). Indeed, “as long as the foreign court abides by ‘fundamental standards of
18 procedural fairness,’ granting comity is appropriate.” *Id.* (quoting *Cunard S.S.*
19 *Co.*, 773 F.2d at 457). *See Hilton*, 159 U.S. at 159-60 (deference to a foreign
20 judgment on comity principles is generally appropriate where the foreign court had
21 personal and subject-matter jurisdiction, the parties were informed of and had the
22 opportunity to defend against the claim, and there is a record; in such case, “the
23 judgment is prima facie evidence, at least, of the truth of the matter adjudged; and
24 it should be held conclusive upon the merits tried in the foreign court”).⁹

25
26 ⁹ Although the *Hilton* Court identified reciprocity – the willingness of the foreign
27 court to apply preclusive effect to the judgment of a U.S. court – as a requirement
28 for U.S. courts to afford preclusive effect to the foreign court’s judgment, *see*
Hilton, 159 U.S. at 210, later cases have abandoned the reciprocity requirement,
see, e.g., Wilson v. Marchington, 127 F.3d 805, 811-12 (9th Cir. 1997).

1 The prior proceedings in Japan and China were fundamentally fair. The
2 1976 Agreement was executed in Japan, and the parties to the 1976 Agreement –
3 TPC and Mr. Sompote – were from Japan and Thailand, respectively (and Mr.
4 Sompote’s successor UMC is from Japan). See Dkt. 19, ¶¶ 5, 6, 8. Furthermore,
5 TPC and Mr. Sompote (and UMC) appeared in the prior proceedings and litigated
6 the cases to finality, as evidenced by the Judgments from those proceedings. Thus,
7 there can be no dispute that the courts in China and Japan had personal and subject
8 matter jurisdiction, or that the parties had the opportunity to defend the other’s
9 claims.

10 Furthermore, applying the doctrine of comity is just because there is no
11 evidence that the Chinese or Japanese proceedings were procedurally unfair. “‘It
12 has long been the law that unless a foreign country’s judgments are the result of
13 outrageous departures from our own notions of ‘civilized jurisprudence,’ comity
14 should not be refused.’” *Ohno v. Yasuma*, 723 F.3d 984, 1003 (9th Cir. 2013)
15 (quoting *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th
16 Cir. 1974) (quoting *Hilton*, 159 U.S. at 205)). “‘Foreign-law notions are not per se
17 disharmonious with due process by reason of their divergence from the common-
18 law notions of procedure.’” *Wilson v. Marchington*, 127 F.3d 805, 811-12 (9th Cir.
19 1997) (quoting *Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n.
20 36 (Okla. 1990)). Of course, as with any system of jurisprudence, there are
21 differences between the law applied by courts in China and Japan and that applied
22 by American courts. There is, however, no basis for contending that such
23 differences are so extreme as to constitute “outrageous departures” from “civilized
24 jurisprudence.” *Ohno*, 723 F.3d at 1003.

25 Importantly, “[f]oreign judgments are not to be ‘tried afresh’ in U.S. courts,
26 applying domestic concepts.” *Id.* (citing *Hilton*, 159 U.S. at 202-03). “‘We are not
27 so provincial as to say that every solution of a problem is wrong because we deal
28 with it otherwise at home.’” *Id.* (quoting *Loucks ex rel. Loucks v. Standard Oil Co.*

1 of N.Y., 224 N.Y. 99, 111, 120 N.E. 198 (1918) (Cardozo, J.)). To the contrary,
2 “simple inconsistency between American state or federal law and foreign law . . .
3 does not render a foreign judgment unenforceable by reason of repugnancy.”
4 *Ohno*, 723 F.3d at 1003 (citing *Yahoo! Inc. v. La Ligue Contre Le Racisme et*
5 *L’Antisemitisme*, 433 F.3d 1199, 1215 (9th Cir. 2006) (en banc) (per curiam)
6 (plurality opinion)). Thus, “[i]f American law recognizes generally parallel causes
7 of action, the foreign cause of action cannot be said to be repugnant to American
8 public policy.” *Id.* at 1005 (footnote omitted). Here, the issues ruled on by the
9 courts in China and Japan – *i.e.*, claims of copyright infringement and breach of
10 contract and the defense of unenforceability of the 1976 Agreement due to alleged
11 forgery – are the same claims asserted by the parties to this action; it is therefore
12 beyond dispute that American law recognizes causes of action that are generally
13 parallel to those considered and decided by the Chinese and Japanese courts.

14 United States courts have routinely barred relitigation of contractual issues
15 properly decided by a foreign court. *See Pony Express Records*, 163 F. Supp. 2d at
16 473 (holding that a British court’s judgment on a claim that a contract transferred
17 copyrights estopped the plaintiff from arguing to the contrary to support a claim of
18 copyright infringement); *In-Tech Mktg. Inc. v. Hasbro, Inc.*, 719 F. Supp. 312, 317
19 (D.N.J. 1989) (applying principles of comity and collateral estoppel to prevent
20 plaintiffs from relitigating a Dutch court’s ruling on the issue whether a patent
21 assignment had been dissolved); *Fairchild, Arabatzis & Smith, Inc. v. Prometco*
22 *Co.*, 470 F. Supp. 610, 617 (S.D.N.Y. 1979) (applying res judicata to a British
23 court’s finding of a valid and binding contract, free from fraud).

24 Courts must also ensure that applying comity principles would not be
25 prejudicial to the interests of the United States. *See Wilson*, 127 F.3d at 809 (“[a]s
26 a general policy, ‘[c]omity should be withheld only when its acceptance would be
27 contrary or prejudicial to the interest of the nation called upon to give it effect’”) (quoting *Somportex Ltd.*, 453 F.2d at 440). Here, accepting the 2013 Judgment of
28

1 the Chinese Supreme People's Court or the 2010 Judgment of the Tokyo District
2 Court would not be contrary or prejudicial to the interests of the United States.
3 The 1976 Agreement has no special nexus to the United States; on its face, it
4 conveys rights in every country in the world other than Japan. The United States'
5 interests in the 1976 Agreement do not so far outweigh the interests of China and
6 Japan in that Agreement as to require the Court to reconsider the prior judgments
7 by courts in those countries. In fact, the application of comity in this instance
8 would serve the interests of the United States by "promot[ing] cooperation and
9 reciprocity with foreign lands," *Mujica*, 771 F.3d at 598, and would also further the
10 interests of judicial economy and finality in litigation.

11 **B. Under the Last-in-Time Rule, the 2013 Chinese Judgment and/or**
12 **the 2010 Japanese Judgment as to the Lack of Forgery are**
13 **Entitled to Preclusive Effect Vis-à-Vis the 2007 Thai Judgment.**

14 Under the last-in-time rule, "[i]f two or more courts render inconsistent
15 judgments on the same claim or issue, a subsequent court is normally bound to
16 follow the most recent determination that satisfies the requirements of *res*
17 *judicata*." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). *See, e.g.,*
18 *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939) (holding that
19 conclusive effect must be given to the last in time of two inconsistent judgments);
20 *Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.
21 1997) ("[w]hen a court is faced with inconsistent judgments, 'it should give *res*
22 *judicata* effect to the *last* previous judgment entered'" (quoting *Robi*, 838 F.2d at
23 328); *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529-30 (9th
24 Cir. 1985) (same); Restatement (Second) of Judgments § 15 (1982) ("[w]hen in
25 two actions inconsistent final judgments are rendered, it is the later, not the earlier,
26 judgment that is accorded conclusive effect in a third action under the rules of *res*
27 *judicata*"). *See generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice*
28 *& Procedure: Jurisdiction.2d*, § 4404, at 60-75 (2002 & supp. 2015).

As the Ninth Circuit explained in *Americana Fabrics, Inc.*:

1 When the same claim or issue is litigated in two courts, the
2 second court to reach judgment should give *res judicata* effect to the
3 judgment of the first, regardless of the order in which the two actions
4 were filed. . . . Sometimes, however, the second court does not give
5 preclusive effect to the judgment of the first court. This can occur
6 when *res judicata* is not asserted in the second court, or when the
7 second court decides, rightly or wrongly, that the doctrine does not
8 apply. Should the claim or issue then come before a third court, as it
9 did before the Central District in this case, that court is faced with
10 conflicting judgments from the first two courts. The governing rule to
11 be applied is quite clear. ***The third court should give res judicata***
12 ***effect to the last previous judgment entered.***

13 *Americana Fabrics, Inc.*, 754 F.2d at 1529-30 (emphasis added). *See id.* at 1530 n.
14 2 (“[t]he rule is equally applicable when there are three or more prior inconsistent
15 proceedings”).

16 “[T]he last in time rule is supported by the rationale that it “end[s] the chain
17 of relitigation . . . by stopping it where it [stands]” after entry of the [most recent]
18 court’s judgment, and thereby discourages relitigation in [yet another] court.”
19 *Robi*, 838 F.2d at 323 (quoting *Americana Fabrics, Inc.*, 754 F.2d at 1530).
20 “[E]ven when we think that the most recent judgment might be wrong, we still give
21 it *res judicata* effect so that finality is achieved and the parties are encouraged to
22 appeal an inconsistent judgment directly rather than attack it collaterally before
23 another court.” *Id.* *See Americana Fabrics, Inc.*, 754 F.2d at 1530 (“[t]he decision
24 is not binding because it is correct; it is binding because it is last”). “[T]he later of
25 the two inconsistent judgments is ordinarily held conclusive in a third action even
26 when the earlier judgment was relied on in the second action and the court
27 erroneously held that it was not conclusive.” Restatement (Second) of Judgments
28 § 15, cmt. n (1982).

29 The last-in-time rule applies to both claim preclusion and issue preclusion.
30 *See Americana Fabrics, Inc.*, 754 F.2d at 1530 (the prior “order has both a claim-
31 preclusive and issue-preclusive effect on the action in the district court”);
32 Restatement (Second) of Judgments § 15 cmt. c (1982) (“[t]he rule stated in this
33 Section governs the effect of a judgment by way of merger, bar, or issue

preclusion”). The last-in-time rule applies regardless of the jurisdiction rendering the judgment. *See Americana Fabrics, Inc.*, 754 F.2d at 1530 n. 2 (last-in-time rule applies to both federal and state judgments); *Koehler v. Bank of Bermuda Ltd.*, 2004 WL 444101, *18 (S.D.N.Y. Mar. 10, 2014) (“[t]he latest in time rule applies to foreign judgments”). The last-in-time rule applies under both federal and California *res judicata* law. *See Americana Fabrics, Inc.*, 754 F.2d at 1530 n. 2 (“[w]e need not reach the issue of whether federal, California, or New York *res judicata* rules apply to this case” because “[t]he ‘last in time’ rule is present in California and New York law as well as in federal law”).

Here, the last-in-time rule applies to preclude TPC from relitigating its claim of forgery. The most recent court to rule on the issue whether the 1976 Agreement is a forgery – the Supreme People’s Court of the People’s Republic of China – found that the 1976 Agreement was not forged, as did the immediately prior court to consider that issue, the Tokyo District Court. *See RJN*, Exs. B, H. Either such determination is sufficient to bar TPC from relitigating the issue of forgery before this Court.

A rationale for affording preclusive effect to the last-in-time court’s judgment is that such court “could have or did consider the *res judicata* effect of earlier cases.” *Robi*, 838 F.2d at 328 (citing *Americana Fabrics, Inc.*, 754 F.2d at 1530). “[I]f one party could have raised *res judicata*, but did not, that litigant must bear the cost of its tactic or inadvertence.” *Id.* at 322-23 (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction*, § 4404, at 26-27 (1981)).

As the Chinese Supreme People’s Court stated, the Chinese courts could have considered the preclusive effect of the Japanese or Thai Judgments, had the parties followed the law allowing them to apply to the intermediate court for recognition of foreign judgments. *See RJN*, Ex. H, at 7-9, 25 (discussing Civil Procedure Law of the People’s Republic of China, Arts. 281, 282 (2012), which

1 allow a party to directly apply to the intermediate people's court for recognition of
2 a judgment, and authorize that court to recognize the validity of the judgment upon
3 making certain findings). However, no party requested recognition of any prior
4 Judgment in the Chinese intermediate court. Where *res judicata* is not properly
5 presented to the last-in-time court, that court's judgment is nonetheless entitled to
6 preclusive effect. See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice &*
7 *Procedure: Jurisdiction.2d*, § 4404, at 62-63 (2002 & supp. 2015) (where a party
8 has inadvertently or intentionally failed to present the issue of *res judicata* to a
9 court, it is fair to preclude a third bite at the apple; "[a]lthough somewhat diluted,
10 the values of repose also suggest that it is better to rest after the second
11 judgment").

12 Furthermore, "the most recent court to decide the matter may have
13 considered and rejected the operation of the prior judgment as *res judicata*, and its
14 decision should be treated as *res judicata* on the preclusive effect of the prior
15 judgment." *Robi*, 838 F.2d at 323 (citing *Americana Fabrics, Inc.*, 754 F.2d at
16 1530). Here, the Japanese courts did consider and reject the operation of foreign
17 judgments as *res judicata*. In its September 30, 2010 Judgment, the Tokyo District
18 Court specifically considered the Judgments from the prior proceedings in Japan,
19 Thailand, and China, and concluded that the December 10, 2003 Judgment of the
20 Tokyo Appellate Court precluded TPC from relitigating the forgery claim. See
21 RJN, Ex. B.

22 The China Supreme Court's September 29, 2013 Civil Ruling is entitled to
23 preclusive effect because it is the last-in-time judgment. Accordingly, such
24 Court's holding bars all of TPC's claims to the extent that they are predicated upon
25 the contention that the 1976 Agreement is forged or unenforceable. However,
26 even if the Court were to decline to give preclusive effect to the Chinese Supreme
27 People's Court's Judgment, the September 30, 2010 Judgment of the Tokyo
28 District Court would bar all of TPC's claims based upon the alleged forgery or

unenforceability of the 1976 Agreement. Thus, because the 2013 Judgment of the Chinese Supreme People's Court and the 2010 Judgment of the Tokyo District Court are subsequent in time to the 2007 Judgment of the Thai Supreme Court, the Court may and should grant UMC's motion upon finding that preclusive effect should be afforded to either or both of the former Judgments on the forgery issue.

C. Under the Doctrines of Claim and Issue Preclusion, the Chinese and Japanese Judgments Bar TPC from Relitigating Its Claims that the 1976 Agreement is a Forgery or Invalid.

There is a split in authority as to whether a federal court giving preclusive effect to the judgment of a foreign court should apply the preclusion law of the foreign jurisdiction or U.S. preclusion law. *See, e.g., Alfadda v. Fenn*, 966 F. Supp. 1317, 1326-30 (S.D.N.Y. 1997) (summarizing split in law, then "conclud[ing] that a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment") (footnote omitted). The Court need not resolve this issue on this motion because under either foreign or U.S. law, either or both the Judgments of the Chinese Supreme People's Court and the Tokyo District Court would be given preclusive effect against TPC's allegations that the 1976 Agreement is forged or unenforceable.

Because the Chinese Supreme People's Court's opinion indicated that TPC could have sought preclusive effect for the Thai Supreme Court's Judgment had it applied to the intermediate court for recognition of that judgment, it follows that the courts of China will give preclusive effect to judgments where a party has followed the proper procedures for requesting such preclusive effect. Because the Tokyo District Court's September 30, 2010 Judgment afforded preclusive effect to the Tokyo Appellate Court's December 10, 2003 Judgment (and specifically declined to afford preclusive effect to the November 14, 2007 Judgment of the Thai Supreme Court and the subsequently overruled October 23, 2009 Judgment of the Guangzhou Intermediate People's Court because of the preclusive effect of the

1 Tokyo Appellate Court's December 10, 2003 Judgment), it follows that Japanese
2 courts would afford preclusive effect to the September 30, 2010 Judgment of the
3 Tokyo District Court.

4 If the Court were to apply U.S. law on *res judicata*, UMC would still
5 prevail. "According to the [Supreme] Court, '[t]he preclusive effect of a judgment
6 is defined by claim preclusion and issue preclusion, which are collectively referred
7 to as "res judicata."'" *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012)
8 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)). "[C]laim preclusion' is
9 the doctrine providing that 'a final judgment forecloses successive litigation of the
10 very same claim, whether or not relitigation of the claim raises the same issues as
11 the earlier suit.'" *Id.* (quoting *Taylor*, 553 U.S. at 892). "Issue preclusion, in
12 contrast, bars successive litigation of an issue of fact or law actually litigated and
13 resolved in a valid court determination essential to the prior judgment, even if the
14 issue recurs in the context of a different claim.'" *Id.* at 926-27 (quoting *Taylor*,
15 553 U.S. at 892). "By 'preclud[ing] parties from contesting matters that they have
16 had a full and fair opportunity to litigate,' these two doctrines protect against 'the
17 expense and vexation attending multiple lawsuits, conserv[e] judicial resources,
18 and foste[r] reliance on judicial action by minimizing the possibility of inconsistent
19 decisions.'" *Taylor*, 553 U.S. at 892 (quoting *Montana v. United States*, 440 U.S.
20 147, 153-54 (1979)).

21 Under federal law, "[i]ssue preclusion bars relitigation of issues adjudicated
22 in an earlier proceeding if three requirements are met: [] (1) the issue necessarily
23 decided at the previous proceeding is identical to the one which is sought to be
24 relitigated; [] (2) the first proceeding ended with a final judgment on the merits;
25 and [] (3) the party against whom [issue preclusion] is asserted was a party or in
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27
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privity with a party at the first proceeding.”¹⁰ *In re Reynoso*, 477 F.3d 1117, 1122 (9th Cir. 2007) (citing *Reyn’s Pasta Bella, LLC*, 442 F.3d at 746).

All three requirements are satisfied here with regard to both the 2013 Judgment of the Chinese Supreme People’s Court and the 2010 Judgment of the Tokyo District Court. First, the issues of alleged forgery and unenforceability asserted by TPC in this lawsuit are identical to the issues necessarily decided by both judgments. Second, both proceedings ended with final judgments on the merits, with: (1) the Japanese Supreme Court having denied review on April 26, 2012 of TPC’s appeal from the July 11, 2011 Judgment of the Japanese Intellectual Property High Court affirming the September 30, 2010 Judgment of the Tokyo District Court; and (2) the Chinese Supreme People’s Court – the court of last resort – having ruled against TPC on this issue. *See* RJN, Exs. B, D, F, H. Third, TPC – the party against which issue preclusion is sought in this case – was a party to both proceedings. *See id.* The Court should therefore find that, under either federal or California law, the 2013 Judgment of the Chinese Supreme People’s Court and/or the 2010 Judgment of the Tokyo District Court bar TPC, as a matter

¹⁰ California’s law of issue preclusion is largely the same. Under California law, “the doctrine of issue preclusion ‘precludes relitigation of issues argued and decided in prior proceedings,’ when six criteria are met. . . . These criteria are: (1) ‘the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding’; (2) the issue to be precluded ‘must have been actually litigated in the former proceeding’; (3) the issue to be precluded ‘must have been necessarily decided in the former proceeding’; (4) ‘the decision in the former proceeding must be final and on the merits’; (5) ‘the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding’; and (6) application of issue preclusion must be consistent with the public policies of ‘preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.’” *White*, 671 F.3d at 927 (quoting *Lucido v. Superior Court*, 51 Cal. 3d 335, 341-43 (1990)). The elements set forth in this six-factor state law test are the same as those set forth in the three-factor federal law test, except for the requirement that the issue to be precluded must have been actually litigated (and not just necessarily decided) in the prior litigation. Because the issues of alleged forgery and unenforceability of the 1976 Agreement were addressed at length in the September 29, 2013 Judgment of the Chinese Supreme People’s Court and the September 30, 2010 Judgment of the Tokyo District Court, those issues were actually litigated in the proceedings in China and Japan.

1 of issue preclusion, from relitigating its claims that the 1976 Agreement was
2 forged.

3 TPC's Eleventh Affirmative Defense does not allege the legal or factual
4 basis for TPC's contention that the 1976 Agreement is invalid under Japanese law.
5 However, because TPC has already litigated (and lost) the issue of validity of the
6 1976 Agreement, issue preclusion bars it from challenging the validity of that
7 Agreement even if the challenge is based on a somewhat different theory.¹¹ See
8 *Kamilche Co. v. United States*, 53 F.3d 1059, 1062-63 (9th Cir. 1995) (rejecting
9 United States' argument that it was not collaterally estopped from litigating issue
10 of adverse possession to prove land ownership because in the prior lawsuit it had
11 relied on land title – not adverse possession – to prove ownership; ““once an *issue*
12 is raised and determined, it is the entire *issue* that is precluded, not just the
13 particular arguments raised in support of it in the first case””) (quoting *Yamaha*
14 *Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)), *amended*, 75
15 F.3d 1391 (9th Cir. 1996); *Applied Medical Resources Corp. v. U.S. Surgical*
16 *Corp.*, 352 F. Supp. 2d 1119, 1123-27 (C.D. Cal. 2005) (defendant who
17 unsuccessfully brought claim of patent invalidity in first lawsuit based on certain
18 grounds was precluded from relying on other grounds for invalidity in second
19 lawsuit); Restatement (Second) of Judgments § 27, cmt. c (1982) (“if the party
20 against whom preclusion is sought did in fact litigate an issue . . . and suffered an
21 adverse determination, . . . new arguments may not be presented to obtain a
22 different determination of that issue”).

23 **D. The Thai Judgment is Not Entitled to Preclusive Effect.**

24 As discussed above, because the Chinese and Japanese Judgments postdated
25 the Thai Supreme Court's November 14, 2007 Judgment, under the last-in-time

26
27 ¹¹ To the extent TPC's affirmative defense is based upon the alleged termination of
28 the 1976 Agreement after the time of the Chinese and Japanese Judgments, that
defense would not be precluded. As discussed below, UMC seeks summary
judgment against TPC's claim that it has terminated the 1976 Agreement.

1 rule the latter Judgment is not entitled to preclusive effect. UMC notes that a
2 former president of TPC, Hideaki Tsuburaya, submitted a statement dated
3 February 26, 2013 in a court in China in which he stated his belief that the Thai
4 Supreme Court's 2007 Judgment was procured through bribery on behalf of TPC.
5 *See* Wexler Decl., Exs. E, F. If the Court were to credit Mr. Tsuburaya's
6 testimony, no preclusive effect could be given to the Thai Supreme Court's 2007
7 Judgment. *See* Restatement (Third) of Foreign Relations Law § 482, cmt. e (1987)
8 (foreign judgment is not enforceable where there has been "fraudulent action by
9 the prevailing party that deprived the losing party of adequate opportunity to
10 present its case to the court"). While UMC does not ask the Court to grant it
11 judgment on the pleadings or summary judgment based upon Mr. Tsuburaya's
12 testimony, it is providing the Court with this evidence to explain why the Court
13 should not grant summary judgment *sua sponte* against UMC if it were to conclude
14 that the Chinese Supreme Court's September 29, 2013 Judgment and the Tokyo
15 District Court's September 30, 2010 Judgment are not entitled to preclusive effect
16 but that the Thai Supreme Court's November 14, 2007 appears on its face to be
17 entitled to preclusive effect.

18 **II. TPC HAS NO RIGHT TO TERMINATE THE 1976 AGREEMENT.**

19 In its July 10, 2014 letter to Mr. Perasit, TPC purported to terminate the
20 1976 Agreement pursuant to Article 597, Section 3 of the Civil Code of Japan (and
21 if there is any compensation for the rights, pursuant to Article 617, Section 1 of
22 that Code). *See* Wexler Decl., Ex. C. On their face, however, neither provision
23 applies to the 1976 Agreement, a contract that transfers intellectual property rights.

24 First, Article 597, Section 3 applies to demands for the return of "borrowed
25 Things." *See* Civil Code of Japan, Article 597 (Timing of Return of Borrowed
26 Things), Section 3 ("[i]f the parties have not specified the timing of the return and
27 the purposes of the using and taking profits, the lender may demand the return of
28 the *borrowed Things* at any time") (emphasis added). Because the term "Things"

1 refers to “tangible thing[s],” *see* Civil Code of Japan, Article 85, Article 597 has no
2 applicability to assignments of or licenses for intellectual property, an intangible
3 asset. Furthermore, Article 597 is part of Part III (Claims), Chapter 2 (Contracts),
4 Section 6 (Loans for Use). Section 6 applies only when a party has gratuitously
5 received a “Thing” from the other party. *See* Civil Code of Japan, Article 593 (“[a]
6 loan for use shall become effective when one of the parties receives a defined
7 Thing from the other party by promising that he/she will return the Thing after
8 he/she has *gratuitously* made use of and taken the profits of the same”) (emphasis
9 added). In the September 30, 2010 Judgment, the Tokyo District Court held that
10 the 1976 Agreement “was written to replace [TPC’s] debt by granting the
11 exclusive exploitation rights to [Mr. Sompote].” RJN, Ex. B, at 44. Issue
12 preclusion bars TPC from contending that the 1976 Agreement was gratuitous.

13 Second, Article 617, Section 1 applies to the termination of leases. *See* Civil
14 Code of Japan, Article 617, Section 1. Article 617 is part of Part III (Claims),
15 Section 7 (Leases). Under Section 7, a “lease” requires a “Thing.” *See* Civil Code
16 of Japan, Article 601 (“[a] lease shall become effective when one of the parties
17 promises to make a certain *Thing* available for the using and taking of the profits
18 by the other party and the other party promises to pay rent for the same”) (emphasis added). As stated above, the term “Thing” refers to a tangible thing.
19 *See* Civil Code of Japan, Article 85. Furthermore, Article 617, Section 1 makes it
20 clear that the provision applies to leases of land and other tangible property, not to
21 assignments of or licenses for intellectual property, by referring solely to real
22 property and other tangible things in stating when terminated leases expire.¹²

25 ¹² *See* Article 617 (Offers to Terminate Leases with Indefinite Terms), Section 1
26 (“[i]f the parties do not specify the term of a lease, either party may request to
27 terminate it at any time. In such cases, the leases listed in the following items shall
28 terminate on the expiration of the respective periods from the day of the request to
terminate prescribed respectively in those items: (i) [l]eases of land: one year; (ii)
[l]eases of buildings: three months; and (iii) [l]eases of movables and seating hire
facilities: one day”).

Article 540, Section 1 of the Civil Code of Japan, the general statutory provision governing the cancellation of contracts, authorizes cancellation only where the party has a contractual or independent legal right to cancel the contract. *See id.* (“*[i]f one of the parties has a right to cancel in accordance with the provisions of the contract or law*, the cancellation shall be effected by manifestation of intention to the other party”) (emphasis added). Here, there is nothing in the 1976 Agreement that conveys any right of termination, and TPC has not identified (and cannot identify) any independent legal ground allowing it to unilaterally terminate the 1976 Agreement. Accordingly, UMC is entitled to summary judgment against TPC’s claim that it has terminated that Agreement.

CONCLUSION

UMC respectfully asks the Court: (1) to hold that the 2013 Judgment of the Chinese Supreme People’s Court and the 2010 Judgment of the Tokyo District Court preclude TPC from relitigating its contention that the 1976 Agreement is a forgery or unenforceable; (2) to hold that TPC’s July 10, 2014 letters were ineffective to terminate the 1976 Agreement; and (3) to dismiss TPC’s Third, Tenth, and Eleventh Affirmative Defense and its First and Second Counterclaims to the extent that they are predicated upon the contentions that the 1976 Agreement (a) is a forgery or unenforceable or (b) has been terminated.

Dated: July 25, 2016

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